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IN THE

Supreme Court of the United States

NO. 78-1460

APPLE THEATRE, INC.,
Petitioner,

v.

CITY OF SEATTLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

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INDEX

TABLE OF CONTENTS

Page

OPINION BELOW. 2

JURISDICTION 2

QUESTIONS PRESENTED. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT –

I. The provisions of the City of Seattle Adult Movie Theatre Zoning Ordinances are in violation of Petitioner's right to equal protection under the law guaranteed under the Fourteenth Amendment of the Constitution in that adult movie theatres are forced into designated cluster zones, and adult bookstores, peep show operations, drive-in movies exhibiting adult film fare and other adult entertainment estabments are not similarly treated, and this is so whether this Court were to apply, as it should, the "strick scrutiny test", the rational relationship test, or follow the middle tier approach. 5

Page

II. The provisions of the City of Seattle Adult Movie Theatre Zoning Ordinances are void for vagueness in that they define an adult theatre by the content of the press material presented without a definition as to whether one film of such content exhibited would subject the Petitioner to sweeping criminal penalties, and as such, violates Petitioner's rights under the First, Fifth and Fourteenth Amendments 11

CONCLUSION 16

TABLE OF CITATIONS

Cases

Barbier v. Connolly, 113 U.S. 27 (1855) 8
Bayou Landing v. Watts, 563 F. 2d 1172 (5th Cir. 1977) 7
Bayside Enterprises v. Carson, 450 F. Supp. 696 (1978) 7
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 14,15
Chicago v. Mosley, 408 U.S. 92 (1972) 10
Conally v. General Construction Company, 269 U.S. 385 (1926) 13
Cox v. Louisiana, 379 U.S. 559 (1965) 10
Craig v. Boren, 429 U.S. 190 (1976) 9
Dombrowski v. Pfister, 380 U.S. 479 (1965) 7,13
E. & B. Enterprises v. City of University Park, 449 F. Supp. 695 (1978) 7
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 10

Freedman v. Maryland, 380 U.S. 51 (1965) 7
Grayned v. City of Rockford, 408 U.S. 104 (1972) 13,14
Hart Book Stores v. Edmisten, 450 F. Supp. 904 (1978) 7
Heller v. New York, 413 U.S. 483 (1973) 6
Jordan v. DeGeorge, 341 U.S. 223 (1951) 13
Keyshian v. Board of Regents, 385 U.S. 589 (1967) 13
Lindsey v. Natural Carbonic Gas, 220 U.S. 61 (1911) 8
McDonald v. Board of Election Commissioners, 392 U.S. 802 (1969) 8
Nortown Theatre v. Gribbs, 373 F. Supp. 363 (1974) 12
Railway Express Agency v. New York, 336 U.S. 106 (1949) 8
Reed v. Reed, 414 U.S. 71 (1971) 8
Royster Gland Company v. Virginia, 253 U.S. 412 (1920) 8
Shapiro v. Thompson, 394 U.S. 618 (1969) 10
Williams v. Rhodes, 393 U.S. 23 (1968) 10
Williamson v. Lee Optical Company, 348 U.S. (1955) 10
Young v. American Mini Theatres, 427 U.S. 50 (1976) 6,12

Law Review Articles

In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972. THE SUPREME COURT, 1971 Term – Forword 9

Wilkinson, The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 VA. L. REV. 945 (1975) 9

INDEX TO APPENDIX

Page

Appendix A. A.1
Appendix B. A.20
Appendix C. . . . . A. 21
Appendix D. A.22
Appendix E. A.23
Appendix F. A.24

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CITY OF SEATTLE,
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Washington entered in the above case on October 19, 1978.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported in 90 Wn. 2d 709, and a copy thereof is set forth in Appendix "A" hereto. A copy of the Order denying Rehearing on December 14, 1978, is set forth in Appendix "B" hereto.

JURISDICTION

The Judgment of the Supreme Court of the State of Washington was entered on October 19, 1978. A Petition for Rehearing was timely filed and denied on December 14, 1978. On January 11, 1979, Circuit Justice Rehnquist denied Petitioner's Motion for Order staying the Execution and Enforcement of City of Seattle Adult Movie Theatre Zoning Ordinance pending application for and determination of Writ of Certiorari, said Denial is set forth in Appendix "C" hereto. This Court's jurisdiction is invoked under *Title 28, United States Code §1257(3).*

QUESTIONS PRESENTED

1. Are the provisions of the City of Seattle Adult Movie Theatre Zoning Ordinance in violation of Petitioner's right to equal protection under the law guaranteed under the Fourteenth Amendment of the Constitution in that adult movie theatres are forced into designated cluster zones, and adult bookstores, peep shows ,operations, drive-in movies exhibiting adult film fare and other adult entertainment establishments are not similarly treated, and is this so whether this Court were to apply, as it should, the "strict scrutiny test", the rational relationship test or follow the middle tier approach?

2. Are the provisions of the City of Seattle Adult Movie Theatre Zoning Ordinance void for vagueness in that they define an adult theatre by the content of the press material presented without a definition as to whether one film of such content exhibited would subject the Petitioner to sweeping criminal penalties, and as such, violate Petitioner's rights under the First, Fifth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution are set forth in Appendix "D" hereto.

STATEMENT

Petitioner is a Washington corporation and the operator of an adult theatre in the City of Seattle since September of 1971. On July 7, 1976, the City of Seattle amended its zoning ordinance (86300) and adopted an "Adult Motion Picture Zoning Ordinance" Nos. 105565 and 105584, which prohibited all adult theatres except for those located in three (3) designated city zones in the heart of downtown Seattle. (See City Zoning map attached hereto as Exhibit "E"). A copy of the respective Ordinance Nos. 105565 and 105584, is set forth herein as collective Exhibit "F". The Ordinance further requires all adult theatres located outside of the three (3) designated zones to terminate their business within 90 days. Petitioner's theatre is located one (1) block east of the three (3) permitted zones and the Ordinance would require that the owners of this theatre make an unwelcome choice; to avoid prosecution of themselves and their employees they must either engage in

"self-censorship" and restrict their movie offerings or immediately terminate Petitioner's theatre business, and thus, the projected deterrent effect of this Ordinance is both real and substantive in its impact on First Amendment rights.

On September 17, 1976, Petitioner commenced an action in the Superior Court of the State of Washington for King County against the City of Seattle for declaratory judgment and injunctive relief, alleging that the ordinance was unconstitutional both on its face and as applied to Petitioner's particular theatre. In particular, Petitioner alleged that the Ordinance deprived it of property without due process of law, denied equal protection of law and was void for impermissible overbreadth and/or void for vagueness and as such, an abridgement of free speech and press, all in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution. Petitioner immediately thereafter moved for a preliminary injunction pending trial which was granted. After trial, the Superior Court decided the Ordinance to be constitutional in all respects, dismissed Petitioner's complaint and ordered the preliminary injunction dissolved on March 22, 1977.

Petitioner immediately filed an appeal in the Washington State Court of Appeals Division I where Petitioner's motion for a temporary stay pending appeal was granted on April 22, 1977. The Court of Appeals subsequently certified the case to the Washington State Supreme Court for determination noting that the case "involves fundamental and urgent issues of broad public import requiring prompt and ultimate determination." On October 19, 1978, the Supreme Court for the State of Washington decided the Ordinance was constitutional in all respects, dissolved the temporary injunction and affirmed the judgment below. Petitioner's motion for reconsideration was

denied on December 14, 1978. Subsequent thereto, Petitioner's Motion for Order Staying the Execution and Enforcement of the City of Seattle Adult Movie Theatre Zoning Ordinance pending application for and determination of Writ of Certiorari was denied by Circuit Justice Rehnquist on January 11, 1979.

REASONS FOR GRANTING THE WRIT

I.

THE PROVISIONS OF THE CITY OF SEATTLE ADULT MOVIE THEATRE ZONING ORDINANCE ARE IN VIOLATION OF PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE LAW GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION IN THAT ADULT MOVIE THEATRES ARE FORCED INTO DESIGNATED CLUSTER ZONES, AND ADULT BOOKSTORES, PEEP SHOW OPERATIONS, DRIVE-IN MOVIES EXHIBITING ADULT FILM FARE AND OTHER ADULT ENTERTAINMENT ESTABLISHMENTS ARE NOT SIMILARLY TREATED, AND THIS IS SO WHETHER THIS COURT WERE TO APPLY, AS IT SHOULD THE "STRICT SCRUTINY TEST", THE RATIONAL RELATIONSHIP TEST, OR FOLLOW THE MIDDLE TIER APPROACH.

On May 17, 1976, the City Council for Seattle amended its ordinances relating to land use to define "Adult Motion Picture Theatre" to permit the same to operate in several selective and clustered downtown areas and provided for termination of such uses in all other zones. (See Ordinance No. 105565 [Appendix F] as set forth in the Appendix hereto.)

On June 1, 1976, there was a further amendment by the City Council restricting the operation of an *adult motion picture theatre* in a more intensive zone. (See Ordinance No. 105584 [Appendix F] as set forth in the Appendix hereto.)

The land use ordinance, as amended, required that all adult motion picture theatres outside of the narrowly restricted downtown clusters be shuttered within ninety (90) days irrespective of the length of their operation or investment of stockholders.

The Petitioner, Apple Theatre, Inc., has its location only one (1) block outside of the narrowly restricted downtown cluster and if the land use ordinance is permitted to stand, the Petitioner will either have to shutter his facility which shows motion picture films, presumptively protected under the First and Fourteenth Amendments to the Constitution of the United States. (*Heller v. New York*, 413 U.S. 483 (1973).)

In *Young, et. al. v. Mini-Theatres, et. al.*, 427 U.S. 50, 49 L.Ed 2d 310, 96 S. Ct. 2440 (1976), this Court upheld the attacks made on the alleged constitutional deficiencies of the City of Detroit Zoning Ordinance.

The said Ordinance did not, under the category of "relocated use" restrict itself to adult motion picture theatres, but included ten (10) different kinds of establishments in addition to adult theatres. The regulation uses included inter alia adult bookstores. (See *Young*, 427 U.S., *supra*, footnote three at page 52.)

The City of Seattle Land Use Ordinance herein challenged unlike the City of Detroit Ordinance involved in the *Young* case, *supra*, denies equal protection to the owners and operators

of adult book stores and the so called "Peep Show Movie" operations, and as such constitutes invidious discrimination and a denial of Petitioner's rights to equal protection under the Fourteenth Amendment to the Constitution of the United States.

The City of Seattle Land Use Ordinances impacts upon Petitioner's First Amendment rights and is thus presumed invalid. *Bayou Landing v. Watts*, 563 F. 2d 1172 (5CA 1977). *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 24, 649 (1965). See also: *E. & B. Enterprises v. City of University Park*, 449 F. Supp. 695 (1978); *Bayside Enterprises v. Carson*, 450 F. Supp. 696 (1978); and *Hart Book Stores v. Edmisten*, 450 F. Supp. 904 (1978). Interference with First Amendment rights is irreparable harm, *per se. Dombrowski v. Pfister*, 380 U.S. 479, 14 L.Ed 2d, 22 85 S. Ct. 1116.

It cannot be disputed that the omission of adult book stores and peep show adult movie operations are not covered by the "regulated uses" of the City of Seattle Land Use Zoning Ordinance.

The preamble to the Zoning Code under challenge here contains the following statement of purpose:

> "The general purpose of this title is to protect and promote public health, safety, *morals* and general welfare through a well-considered comprehensive plan for the use of land. . . ." *Sec. 2.1 of Zoning Code 26.02.020* (Emphasis Supplied).

Given the stated purpose of the City of Seattle Land Use Zoning Ordinance there can be no question that the asserted articulated governmental purpose – i.e., "protect and promote

public safety, morals. . . ." would apply with equal force to adult bookstores and peep show movie operations featuring press materials depicting "specified sexual activities" and the failure to so incorporate those adult entertainment facilities, runs afoul of the Petitioner's rights to equal protection under the law.

This Court in *Reed v. Reed*, 414 U.S. 71, 30 L.Ed. 2d 225, sets forth the rationale of the equal protection clauses where at page 75 we read:

> "In applying that clause, this Court has constantly recognized that the Fourteenth Amendment does not deny to States the power to treat different classes or persons in different ways. Barbier v. Connolly, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1855); Lindsey v. Natural Carbonic Gas, 220 U.S. 61, 55 L. Ed. 369, 31 S. Ct. 337 (1911); Railway Express Agency v. New York, 336 U.S. 106, 93 L. Ed. 533, 69 S. Ct. 463 (1949); McDonald v. Board of Election Commissioners, 392 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969). The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. . . ."

In *Royster Gland Company v. Virginia*, 253 U.S. 412 at 415 (1920), this Court stated:

> "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced shall be treated alike."

Mr. Justice Powell, concurring in *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451, (1976), discussing the difficulty in dealing with equal protection analysis at a footnote on page 211 where we read as follows:

> "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach – with its narrowly limited "upper-tier" – now has substantial precedential support. As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. For thoughtful discussions of equal protection analysis, see, e.g., Gunther, The Supreme Court, 1971 Term – Forword; In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection, 86 Harv L. Rev. 1 (1972); Wilkinson. The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va L. Rev 945 (1975)."

When dealing with presumptively protected press materials, this Court has observed in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268, at page 215:

> "This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, e.g., Williamson v. Lee Optical Company, 348 U.S. 483, 488-488, 99 L. Ed. 563, 75 S. Ct. 461 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[A]bove all else, the First Amendment means that government has no power to restrict expression, because of its message, its ideas, its subject matter, or its content.' Police Department of Chicago v. Mosley, 408 U.S. at 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286. Thus, 'under the Equal Protection Clause, not to mention the First Amendment itself,' Id., at 96, 33 L. Ed. 2d 212, 22 S. Ct. 2286, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also Cox v. Louisiana, 379 U.S. 559, 581, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965) (opinion of Black, J.). Cf. Williams v. Rhodes, 393 U.S. 23, 21 L.Ed. 2d 24, 89 S. Ct. 5 (1968); Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)."

There can be no justification for distinguishing adult motion picture theatres from other types of adult entertainment establishments within the penumbra of the First Amendment (i.e., bookstores, drive-ins and peep show operations) in

a regulation purportedly designed to "protect and promote public health, safety, morals. . . ."

The deterrent effect of the City of Seattle Land Use Zoning Ordinance on legitimate expression is both real and substantial. Since the Ordinance applies only to walk-in theatres, the owners and operators of those theatres are faced with an unwelcome choice: to avoid prosecution of themselves and their employees, they must either restrict their movie offerings or go out of business. Either choice may be extremely expensive and to the Petitioner herein it could be terminal.

The City of Seattle Land Use Zoning Ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Accordingly, Certiorari should be granted to review the said Ordinance.

II.

THE PROVISIONS OF THE CITY OF SEATTLE ADULT MOVIE THEATRE ZONING ORDINANCES ARE VOID FOR VAGUENESS IN THAT THEY DEFINE AN ADULT THEATRE BY THE CONTENT OF THE PRESS MATERIAL PRESENTED WITHOUT A DEFINITION AS TO WHETHER ONE FILM OF SUCH CONTENT EXHIBITED WOULD SUBJECT THE PETITIONER TO SWEEPING CRIMINAL PENALTIES, AND AS SUCH, VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS.

The City of Seattle Land Use Zoning Ordinance sought to be reviewed herein purports to regulate an adult motion

picture theatre which is defined in said ordinance in terms of the film content.

This Court in *Young v. American Mini Theatres*, 427 U.S. 50, 49 L. Ed. 310 (1976), discussing the City of Detroit Zoning Ordinance recognized that the classification of a theatre as "adult" was predicated solely on the character of the motion pictures which it exhibits. The language of the City of Detroit Ordinance relating to the classification of an adult theatre was used in part in the City of Seattle Land Use Ordinance.

The issue of the quantum of films required to justify the classification of an enclosed motion picture theatre as an adult theatre was not before the court in *Young*. Since I was original trial counsel for Nortown Theatre, (*Nortown Theatre v. Gribbs*, 373 F. Supp. 363), which case was consolidated for argument and decision with *Young*, I made no claim as to the extent of the quantity of films that reasonably justified an adult theatre classification. The void for vagueness argument was not made because in defining an adult book store the Detroit Zoning Ordinance read in pertinent part as follows:

"Adult Book Store"

"An establishment having as a substantial portion of its stock in trade. . ."

The City of Detroit Zoning Ordinance by so defining an adult book store when dealing with adult motion picture theatres could reasonably be read to mean that a substantial portion of the number of films exhibited at the theatre depict or describe "specified sexual activities" to come within the ambit of an adult theatre.

The City of Seattle Zoning Ordinance by omitting adult book stores in void for vagueness because the theatre owners and operators cannot fairly determine whether one film of the type described – or 27 films would cause a motion picture theatre to be denoted as an adult theatre within the purview of said ordinance.

This Court in *Jordan v. DeGeorge*, 341 U.S. 223, 95 L. Ed. 886, 71 S. Ct. 703, suggests that the test for determining whether non-criminal legislation is unconstitutionally vague is whether the language of the legislation conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. (At pages 231-232). See also: *Keyishian v. Board of Regents*, 385 U.S. 589 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); The Void for Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Review 67.

The City of Seattle Land Use Ordinance by failing to define the adult theatre by quantum of film fare presented, renders the same unconstitutional because "men of common intelligence must necessarily guess at its meaning". *Conally v. General Construction Company*, 269 U.S. 385 (1926).

The section of the zoning ordinance fails to give adequate warning of what activities it proscribes and fails to set out "explicit standards" for those who must apply it in defining an adult movie theatre. *Grayned v. City of Rockford*, 408 U.S. 104, 108-114, 33 L. Ed. 2d 222 (1972).

It cannot be fairly said that the Ordinance can be fairly read to place Petitioner's conduct squarely within the "hard core" of the Ordinance's proscriptions. *Dombrowski v. Pfister*, 380 U.S. 479, 491, 492, 14 L. Ed. 2d 22 (1965).

If this Court concluded that the said Ordinance is not void for vagueness because the exhibition of a single film depicting specified sexual activities brings the theatre's owners and operators within the purview of an adult motion picture theatre and as such subject to restricted geographical cluster zoning, then the same would be void for impermissible overbreadth in violation of Petitioner's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

This Court in *Broadrick v. Oklahoma*, 413 U.S. 601, at pages 611-613, observed:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attemping to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. . ."
>
> ". . .overbreadth claims have also been entertained where statutes by their terms, purport to regulate the time, place and manner of expressive or communicative conduct, see Grayned v. City of Rockford, supra, at 114-121, 33 L. Ed. 2d 222. . ."

Thus, if the articulated purpose of the City of Seattle Land Use Ordinance is to "protect and promote public health, safety and morals" it cannot be said that the showing of one (1) such film depicting or describing specified sexual conduct would affect public health, safety or morals, of the citizens of the City of Seattle. The Ordinance if read to classify a motion picture theatre as an adult theatre by virtue of the exhibition

of one (1) film per year, then the same is void for impermissible overbreadth based on the rationale stated, and reaches protected as well as unprotected conduct, and must, therefore, be struck down on its face and held to be incapable of any permissible constitutional conduct.

Admittedly, Petitioner shows more than one (1) film per year depicting or describing sexual conduct, however, he has standing to raise an attack on the overbreadth of the Ordinance because as stated in *Broadrick, supra*:

> "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Accordingly, the City of Seattle Land Use Ordinance should be struck down as unconstitutional because it is void for vagueness and its prohibitions are too broad in their sweep.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Washington Supreme Court.

Respectfully submitted,

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APPENDIX A

I dissent.

Stafford and Brachtenbach, JJ., concur with Hicks, J.

[No. 45156. En Banc. October 19, 1978.]

Northend Cinema, Inc., Et Al, *Appellants*, v. The City of Seattle, *Respondent*.

[1] Constitutional Law – Construction – Similar State and Federal Provisions. As a general rule, provisions of the state constitution should be given the same interpetation that the United States Supreme Court gives to similar provisions in the federal constitution.

[2] Statutes – Certainty – Standing to Challenge. A party to whom a statute's application is clear cannot challegne the statute because of alleged vagueness in other applications.

[3] Constitutional Law – Freedom of Speech – Third Party Rights. A party challenging a statute for overbreadth may not assert First Amendment rights of others unless the statute has a real and substantial deterrent effect on protected speech.

[4] Constitutional Law – Freedom of Speech – Prior Restraint – Regulation of Location. A zoning ordinance restricting the location of adult movie theaters does not impose an impermissible prior restraint or violate First Amendment freedoms where there is no restraint on the market for distribution and exhibition of such films. The interest of a municipality in regulating use of property for commercial purposes justifies the regulation of place for such First Amendment speech.

[5] Zoning – Exhibition of Films – Classification by Content. A zoning ordinance limiting the location of theaters based on the sexual content of the films shown does not violate equal protection or First Amendment rights where the ordinance neither promotes nor inhibits the exhibition of the films within the specified location, and the ordinance promotes a substantial interest of the city in preserving the quality of its neighborhoods through effective land use planning.

[6] Zoning - Nonconforming Use – Termination – Reasonableness. A zoning authority has the power to require termination of nonconforming uses within a reasonable time. In determining whether a particular period of time is reasonable, each individual use is considered on its own facts and circumstances, balancing the harm or hardship to the user against the benefits to the public to be gained from termination of the use.

Hamilton, J., did not participate in the disposition of this case.

Nature of Action: The operators of three theaters sought a declaratory judgment as to the constitutionality of a zoning ordinance restricting adult movie theaters to a specified downtown area.

Superior Court: The Superior Court for King County, Nos. 817771, 817772, 817845, Frank J. Eberharter, J., on March 22, 1977, upheld the validity of the ordinance but granted a temporary injuction against its enforcement pending appeal.

Supreme Court: Holding that the zoning restriction did not violate First Amendment freedoms or equal protection guaranties, and finding the period for termination of the nonconforming uses reasonable, the court *affirms* the judgement and dissolves the injuction.

Victor V. Hoff, for appellants Northend Cinema, et al.

Charles Stixrud, for appellant Apple Theater.

John P. Harris, Corporation Counsel, and *Dona Cloud, Assistant*, for respondent.

Horowitz, J. – The issues raised here involve the validity of two Seattle city zoning ordinances which have the effect of requiring all adult motion picture theaters as defined in the ordinances, to be located in certain downtown areas, and terminating all nonconforming theater uses within 90 days. The three Seattle theaters prohibited from showing their normal adult fare at their present locations by these ordinances challenge

the constitutionality of the zoning enactments in this declaratory judgment action. The court below heard extensive testimony at trial and upheld the validity of the City's action. We affirm.

The amendments to the City's zoning code which are at issue here are the culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City. Following local resident protests against the opening of such a theater in the Greenwood district, the City's Department of Community Development made a study of the need for zoning controls of adult theaters at the request of both the City Planning Committee and the City Council Committee on Planning and Urban Development. The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters. Of the 46 motion picture theaters operating within the City, 13 showed adult motion pictures exclusively, or almost exclusively. Ten of those 13 were located in downtown areas where such uses are now permitted by the challenged ordinances. The other three, the Ridgemont, the Northend, and the Apple Theater, are in areas outside the designated zones which are characterized by the residential uses. These three theaters show "x-rated" films almost exclusively and display advertisements indicating the nature of the films on the theater marquees or fronts.[1] The

[1] The trial court found Films rated "'X" are identified in the Code of Self Regulation of the Motion Picture Association of America as ""pictures submitted to the Code and Rating Administration which . . . are rated X because of the treatment of sex, violence, crime or profanity."

The advertisements generated by these theaters and the displays on their marquees and fronts indicate the film fare

Department's study concluded that zoning action should be taken to confine adult motion picture theaters to downtown Seattle, and recommended that a conditional use approach be adopted for adult theaters in other areas. The Department's study and recommendation were taken up by the City Planning Commission, which held public meetings and a joint public hearing with the City Council Committee on the subject. At the public hearing Greenwood residents spoke of their concerns regarding the deterioration of residential neighborhoods that accompanies location of adult movie theaters. The concerns expressed were very specific and included the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children. The Planning Commission subsequently voted to recommend that the City zoning code be amended to confine adult theaters to downtown areas and phase out nonconforming uses. The Commission opposed any conditional use plan for other zones.

The neighborhoods in which the three appellant theaters are located have a distinctly residential character. Much effort and money have been invested in long-range improvement plans for these areas. The Greenwood community, in which the Northend and Ridgemont are located, has been the subject of major development plans for years. Millions of dollars of development funds have been invested to improve the quality and conditions

(Footnote 1 continued)
therein is sexually explicit and exploits a market for the shocking and bizarre sexual experience. The films are one sequence of explicit sexual activity after another, almost completely uninterrupted by any plot.

of the community. Ongoing projects include improved sidewalks, lighting, and traffic control, and a new shopping mall. The First Hill Community, in which the Apple Theater is located, has not been the subject of such elaborate development plans, but has received substantial funds for neighborhood improvement and is designated a residential area in the City's long range plans. In short, the goal of the City in amending its zoning code was to preserve the character and quality of residential life in its neighborhoods, as specifically found by the court below. A second and related goal, the court found, was to protect neighborhood children from increased safety hazards, and offensive and dehumanizing influence created by location of adult movie theaters in residential areas. These goals are an integral part of the City's long-range land-use planning effort.

Thus in May and June of 1976 the Seattle City Council amended the zoning ordinance with ordinance No. 105565, enacted on May 28 and effective on or about June 17, 1976, and ordinance No. 105584, enacted June 7 and effective on or about July 7, 1976. The combined effect of the ordinances is to create a land use known as Adult Motion Picture Theaters, to prohibit that use in all city zones except the CM (Metropolitan Commercial), BM (Metropolitan Business), and CMT (Temporary Metropolitan Commercial) zones, and to require termination of all nonconforming uses within 90 days of the date the use becomes nonconforming. The land area comprising the permitted zones is approximately 250 acres. No provision is made in the ordinances for conditional uses in other zones.

At the trial on appellant theaters' declaratroy judgement action the court heard extensive testimony regarding the history and purpose of these ordinances.[2] It heard expert testimony

[2] In view of the extensive record developed at the trial of the City's planning studies, meetings and hearings, we find the

on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record. Its refusal to enter appellant Apple Theater's proposed findings was not error, as these were either unsupported by the record, or not related to ultimate facts concerning a material issue. *In re Kennedy*, 80 Wn.2d 222, 492 P.2d 1364 (1972).

The central question raised is whether, in view of these facts, the action of the City in creating the adult motion picture theater use and confining that use to certain zones within the downtown area is constituional. A second question is whether the City may constitutionally impose a 90-day termination period on nonconforming uses. We answer both questions affirmatively, for the reasons discussed hereafter. We turn first to the constitutionality of the creation and confinement of the adult motion picture theater use.

I

Appellants make three constitutional arguments against the Seattle zoning provisions. First, they claim the definition

(Footnote 2 continued)
City has fully sustained its burden of demonstrating the conditions and need for its zoning action. Appellant Apple Theater's objection to the record in this regard is unfounded. See *Parkridge v. Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978). See also *Abbenhaus v. Yakima* 89 Wn.2d 855, 576 P.2d 888 (1978).

of an adult motion picture theater is so vague as to deny them due process of law. Second, they claim the confinement of such theaters to designated zones is an impermissible prior restraint on protected First Amendment speech. Third, they argue the classification of theaters based on the content of the films shown there violates First Amendment and equal protection guaranties.

[1] In response to these contentions we find the decision of the United States Supreme Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976) (hereinafter referred to as *Young*) dispositive. In that case the court approved the creation and definition of an adult theater zoning use identical in all relevant respects to the Seattle zoning use. It also approved regulation of location for that use. Although appellants argue the Seattle ordinance differs from the Detroit ordinance, those differences do not have constitutional significance, as discussed below. We need not, of course, construe the provisions of our state constitution identically with the corresponding provisions of the federal constitution. *Darrin v. Gould*, 85 Wn.2d 859, 868, 540 P.2d 882 (1975). In this case, however, we find the reasoning of *Young* persuasive. It acknowledges and accommodates the important interest of the state in exercising its police power to protect city neighborhoods against degradation, while preserving the democratic principles the constitutional provisions were designed to protect. We therefore find it appropriate to apply the general rule that language in our state constitution will be given the same interpretation as that given the federal constitutional provision by the United States Supreme Court. *See Housing Authority v. Saylors*, 87 Wn.2d 732, 739, 557 P.2d 321 (1976).

A. Vagueness

Appellants' first argument is that the definition of Adult Motion Picture Theater (set out in the margin)[3] is so vague

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[3] Ordinance No. 1055565 Definition of Adult Motion Picture Theater

(§ 1)

"An enclosed building used for presenting motion picture films distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas', as hereinafter defined, for observation by patrons therein:

" ' Specified Sexual Activites' "

"1. Human genitals in a state of sexual stimulation or arousal;

"2. Acts of human masturbation, sexual intercourse or sodomy;

"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

" 'Specified Anatomical Areas' "

"1. Less than completely and opaquely covered:
"(a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

"2. Human male genitals in a discernibly, turgid state, even if completely and opaquely covered."

as to deny them due process of law. They do not attack the included definitions of "Specified Sexual Activities" or "Specified Anatomical Areas," but argue they are not adequately informed of (1) how much "depicting, describing, or relating" to the specified areas is necessary before a film is "distinguished or characterized by an emphasis" thereon; (2) what "depicting, describing or relating to" means; or (3) how frequently such films must be shown before a building is "used" for the purpose.

[2] We note at the outset that the definition of adult theater use contained in the seattle ordinance is identical in all relevant respects to the definition upheld in *Young*.[4] Furthermore, as in *Young*, the complaining theaters show adult

[4] Adult Motion Picture Theater

"An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.

". . .

"For the purpose of this Section, 'Specified Sexual Activities' is defined as:

"1. Human Genitals in a state of sexual simulation or

"2. Acts of human masturbation, sexual intercourse or sodomy.

"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

films almost exclusively. They do not claim they desire to show any other type of film. Therefore, the ordinance is fully adequate to give them notice of the regulated use, and they have no standing to challenge it for vagueness. *Young, supra* at 59.

[3] Nor do appellants have standing to assert the First Amendment rights of others and challenge the ordinance for facial overbreadth. The special rule giving standing to one whose own rights are not violated to challenge an ordinance for overbreadth applies only if the ordinance's deterrent effect on protected First Amendment speech is "both real and substantial" and the ordinance is not easily susceptible to a narrowing construction. *Erznoznik v. Jacksonville*, 422 U.S. 205, 216, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975). We are not persuaded those elements are present here. First, there is no evidence that the effect of this ordinance will be a substantial deterrence to protected First Amendment speech. It does not limit the total number of adult theaters which may operate in the City, or significantly inhibit viewers from gaining access to the films. The court below specifically found the ordinance does not have any significant deterrent effect on the exhibition or viewing of adult motion picture films.[5] Second, any language in the

(Footnote 4 continued)

"And 'Specified Anatomical Areas' is defined as:

"1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola, and

"2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

[5] Since we hold the ordinance does not place a substantial burden on First Amendment speech, no presumption of unconstitutionality is raised. Appellants argument the ordinance is

ordinance which is uncertain is readily subject to a narrowing and constitutionally sound construction. These conclusions accord with those of the court in *Young* under substantially identical circumstances. Appellants' due process claim must therefore be dismissed for lack of standing.

B. Prior Restraint.

Appellants next argue the ordinance is an impermissible prior restraint on protected First Amendment speech because it prohibits the screening of nonobscene films (*i.e.*, protected speech) outside the designated zones.

[4] As pointed out above, appellants make no showing that the market for distribution and exhibition of these films is in fact restrained under the ordinance. There was testimony at trial that adult movie theaters would easily be able to find a location in the designated zones. Furthermore, although potential viewers would be able to see the films only in those downtown areas, there is no evidence that this places any burden on the adult movie market.

Under these circumstances, where there is no restraining effect on the market, and no substantial deterrent effect on individual rights of free speech, the City's most important interest in regulating use of its property for commercial purposes is

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(Footnote 5 continued)
presumptively invalid must therefore be rejected. Nor must the City choose the least restrictive alternative available to accomplish the purpose, as alleged by appellants, since there is no substantial burden on free speech.

clearly sufficient to justify the zoning regulation here. We conclude the zoning regulation of location of adult movie theaters is a reasonable regulation of place for First Amendment speech which does not violate First Amendment freedoms. *See Young* at page 63. The different treatment accorded adult movie theaters as distinguished from other types of movie theaters is a different issue, which we discuss next.

C. Classification Based on Content

The final objection made to the constitutionality of the zoning scheme is that it classifies theaters on the basis of the content of the films shown, and treats adult movie theaters differently from other theaters showing films protected by the First Amendment. This, appellants claim, violates both the First Amendment and equal protection guaranties.

The United States Supreme Court, considering this argument in *Young*, departed from traditional First Amendment jurisprudence and upheld both the classification of films based on sexually explicit content and the different treatment accorded the theaters showing them. The majority in *Young* did not reach agreement on a rationale for this result, but two elements appear to have been dispositive. We find those elements present here, and are persuaded the Seattle scheme does not deny or infringe on the rights of free speech and equal protection.

[5] The first element is that the ordinance has only a slight and neutral effect on protected speech. No real restraint or deterrent effect is evident. The ordinance regulates only the place where these films can be shown. It demonstrates a reasonable decision that the public welfare is best served by having this particular type of speech take place only in certain areas of

the community. The ordinance thus remains neutral regarding the content of the films—it neither approves nor disapproves of that content, and neither promotes nor inhibits exhibition of the films.[6]

The second element is the City's great interest in protecting and preserving the quality of its neighborhoods through effective land-use planning. The record demonstrates the City's sincere and sustained effort to enhance and improve the quality of life in Seattle. Zoning is an extremely important tool for achieving land-use goals in a municipality. *See Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974). Thus, "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young, supra* at 71.

We emphasize that the purpose of the ordinance is not to regulate the content of speech. Contrary to the assertions of the appellants, the ordinance is not a disguised form of censorship. The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods. The evidence is more than adequate to support the finding below that the goal of the ordinance is to preserve the character and quality of residential life in the City.

[6] Four of the justices in *Young* reasoned that society has less interest in protecting sexually explicit expression than other types of protected speech. This reasoning is not essential to the result reached, and we do not adopt it as the basis for the result reached here. We note, moreover, that our decision is confined in its effect to regulation by zoning of sexually explicit speech in films under the particular circumstances of this case.

The choice of methods for locating adult movie theaters, that is to concentrate them in the business areas of the City rather than disperse them (as did the Detroit ordinance), is not of constitutional significance. The City's planning effort must be accorded a sufficient degree of flexibility for experimentation and innovation. *Young, supra* at 71, 73. We cannot substitute our judgement of what would be the most effective method of regulation in this regard. It should also be noted that the majority in *Young* specifically approved the concentration method. *Young, supra* at 62, 71.

Nor do we find it significant that the Detroit ordinance upheld in *Young* had a provision allowing waiver of the ordinance restriction while the Seattle ordinance does not. Our conclusion that the City may regulate the location of adult movie theaters is not dependent in any way on the existence of possible waiver for existing theater locations. The Detroit waiver provision likewise played no part in the reasoning of the majority in *Young*. Nor is there any showing the appellants are constitutionally entitled to exemptions from the zoning restriction in this particular case. Appellants therefore fail to show any constitutional deficiency in this regard.

We conclude the City's paramount interest in protecting, preserving, and improving the character and quality of its residential neighborhoods is sufficient to justify this nondiscriminatory zoning regulation of the location of adult movie theaters.[7] We find no violation of First Amendment or equal protection guaranties.

[7] The City also asserts an interest in protecting children as a justification for the ordinance. This interest alone will not

We therefore turn to the final issue presented, the constitutionality of the provision for termination of nonconforming uses within 90 days.

II

Appellants contend the 90-day termination provision denies them equal protection in that no other nonconforming use must be terminated in such a short period, and denies them due process by creating an economic hardship outweighing the public benefit to be gained by termination.

[6] With regard to the equal protection argument, appellants fail to show they are similarly situated with other nonconforming users. This is particularly evident because the calculation of a reasonable termination period, as discussed below, depends on the facts and circumstances of the particular case. Since each case must be determined on its own merits, the equal protection analysis does not apply.

In *Seattle v. Martin*, 54 Wn.2d 541, 342 P.2d 602 (1959) this court recognized the power of a municipality to require termination of nonconforming uses within a reasonable period of time. We adopted a balancing test to determine the reasonableness of the termination period, that is, whether the harm or hardship to the user outweighs the benefit to the public to be

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(Footnote 7 continued)
support a classification based on the content of speech. *Erznoznik v. Jacksonville*, 422 U.S. 206, 213, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975). We recognize, however, that the particular needs of children are a significant element in determining the quality of urban residential neighborhoods.

gained from termination of the use. *Seattle v. Martin, supra* at 544. As pointed out above, this test is applied on a case-by-case basis, looking to the circumstances of each nonconforming user. Applying this test to each of the appellants here, we conclude the 90-day termination period is not unreasonable and does not deny appellants due process of law.

Northend Cinema, Inc., has the license to operate the Northend Theater. The evidence at trial showed the owner and lessor of the building is an officer of the corporation. The leasing arrangement is thus very informal and may be characterized as terminable at will or on short notice by the parties. Therefore, Northend is not bound by any lease obligation to remain at its present location. Nor is it bound by its lease or its license to show adult films as opposed to any other type of film. Furthermore, whatever costs it has expended for improvements to the building or necessary equipment have either been completely recovered through depreciation or were contemplated to be left as property of the lessor.

Gaiety Theaters, Inc., operator of the Ridgemont Theater, is similarly situated. Its lease is the individual obligation of its president, and does not bind the corporation to remain at its present location. It is not bound by its lease or its license to show adult films. Furthermore, it has expended no funds on physical improvements.

Apple Theater, Inc., is the lessee and operator of the Apple Theater. Apple entered into a new 3-year lease just prior to adoption of the ordinance, and while public hearings were being held on the proposal. It is not obligated by its lease, or by its license, to show adult films. Furthermore, all costs it has

expended in improvements to the building or necessary equipment have either been recovered through depreciation or were contemplated to be left as property of the lessor.

In the face of these facts, the court below found appellants had not come forward with any clear evidence of economic harm. The main thrust of their objection, that simply having to move to another location or show a different type of film is substantial economic harm, is unsupported by any clear evidence. The court had a right to conclude that appellants' allegations they will suffer economic harm were speculative at best. The record thus supports the finding of the court below that Northend and Gaiety will incur no economic damage, and Apple will incur no clear economic damage, by enforcement of the ordinance.

The public benefit to be gained by termination, we have said, is a step toward controlling deterioration of city neighborhoods, and toward productive land-use planning. This benefit is well supported by the record.

We conclude the benefit to the public through termination of these uses within 90 days outweighs the harm appellants will sustain thereby. The termination period is reasonable, and appellants have suffered no violation of due process.

We are mindful that this ordinance was passed in 1976. A temporary injuction against enforcement of the zoning restrictions pending this appeal has allowed appellants to continue normal business operations in the intervening months. Much more than 90 days' time has elapsed. Appellants have therefore had more than ample time to prepare for the contingency of having to terminate their present adult movie theater use.

The temporary injunction is dissolved and the judgment below is affirmed.

Wright, C.J., Rosellini, Stafford, Utter, Brachtenbach, Dolliver, and Hicks, JJ., and Price, J. Pro Tem., concur.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

NORTHEND CINEMA, INC., ET AL,
Appellants,

v.

THE CITY OF SEATTLE,
Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having unanimously decided that the appellant's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 14th day of December, 1978.

/s/ _____
Chief Justice

90 Wn. 2d 709

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 11, 1979

Robert Eugene Smith, Esquire
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309

Re: Apple Theatre, Inc. v. City of Seattle
A-616

Dear Mr. Smith:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"1/10/79
Denied
WHR"

Very truly yours,
MICHAEL RODAK, JR.,
Clerk
By

/s/ Francis J. Lorson
Deputy Clerk

th
cc: Ms. Donna Cloud
Asst. City Attorney
10th Floor Municipal Bldg.
Seattle, Washington 98104

APPENDIX D

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or the press or the right of the people peaceably to assemble . . ."

2. The pertinent provisions of the Fourth Amendment are:

   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

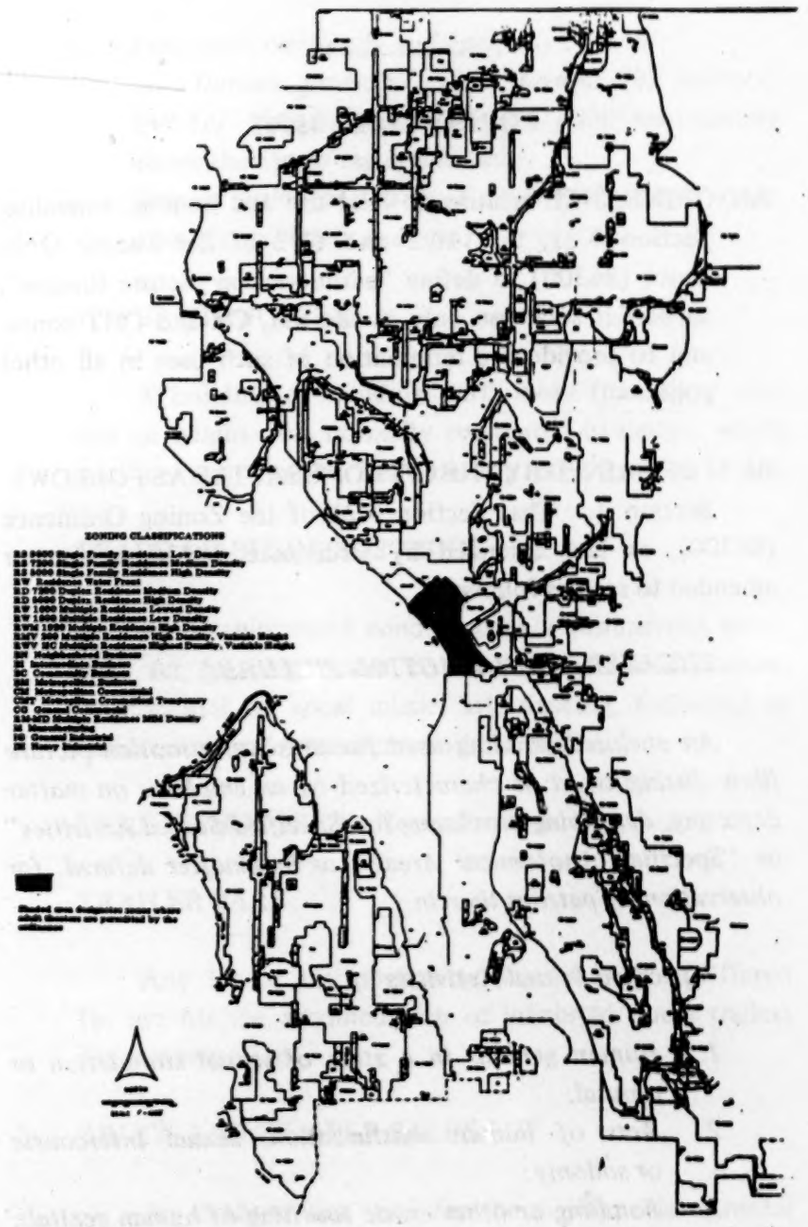
3. The pertinent provisions of the Fifth Amendment are:

   "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

4. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the laws."

APPENDIX E



APPENDIX F

ORDINANCE 105565

AN ORDINANCE relating to land use and zoning; amending Section 3.21, 5.3, 16.2 and 17.2 of the Zoning Ordinance (86300) to define "adult motion picture theater", to permit such use only in the BM, CM and CMT zones, and to provide for termination of such uses in all other zones.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. That Section 3.21 of the Zoning Ordinance (86300), as last amended by Ordinance 98426, is further amended to read as follows:

THEATER, ADULT MOTION PICTURE

An enclosed building used for presenting motion picture films distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anotomical Areas", as hereinafter defined, for observation by patrons therein:

"Specified Sexual Activities":

1. *Human genitals in a state of sexual stimulation or arousal;*
2. *Acts of human masturbation, sexual intercourse or sodomy;*
3. *Fondling or other erotic touching of human genitals, public region, buttock or female breast.*

"Specified Anatomical Areas":

1. *Less than completely and opaquely covered: (a) Human genitals, public region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and*
2. *Human male genitals in a descernibly turgid state, even if completely and opaquely covered.*

TOWER STRUCTURE

A building or building part, more than sixty (60) feet in height and normally residential in design, which may or may not be built on top of a base structure.

TRADE OR BUSINESS SCHOOL

An establishment conducted as a commercial enterprise for teaching trades, business or secretarial courses, instrumental or vocal music, art, dancing, barbering or hairdressing or for teaching similar skills.

TRAILER HOUSE (See House Trailer)

TRAILER PARK

Any lot or any portion of any lot used or offered for use for the accomodation of inhabited house trailers for compensation.

TRUCK AND TRAILER SALES LOT

An outdoor area used for the display, sale or rental of new or used trucks or truck trailers, where no repair

work is done except minor incidental repair to vehicles to be displayed, sold or rented on the premises.

Section 2. That Section 5.3 of the Zoning Ordinance (86300), as last amended by Ordinance 104971, is further amended to read as follows:

Section 5.3 Nonconforming Uses and Buildings

5.31 Continuing Existing Use

Any nonconforming building or use may be continued, subject, however, to provisions of Section 5.3.

5.32 Buildings Nonconforming as to Bulk

Any building conforming as to use but which is a building nonconforming as to bulk as of the effective date of this Ordinance may be altered, repaired or extended; provided, that such alteration, repair or extension does not cause such building to further exceed the bulk provisions of this Ordinance.

5.33 Termination of certain Nonconforming Uses

(a) Any nonconforming use not involving a structure or one involving a structure having assessed value of less than one hundred dollars ($100) on the effective date of this Ordinance may be continued for no longer than one year after said date, and any nonconforming use involving a structure having an assessed value of more than one hundred dollars ($100) but less than three hundred dollars ($300) on the effective date of this Ordinance may be continued no longer than two years after said date; provided, however, the above provisions shall not apply to any nonconforming advertising sign.

(b) All advertising signs in R and BN Zones which have been nonconforming uses for a period of three or more years prior to July 1, 1962, shall be discontinued by July 1, 1963, and all other nonconforming advertising sign uses in R and BN Zones shall be discontinued within three years of the date such sign became or becomes a nonconforming use; provided, that such time limitations may be extended for periods of not to exceed two years at a time by the Superintendent of Buildings, upon application by the owner of such sign and payment of a Twenty-five Dollar ($25.00) filing fee, if said Superintendent finds that such nonconforming use is on a lot with or adjacent to and fronting on the same street with uses (other than another advertising sign) which are first permitted in BC or more intensive zones or that such nonconforming use is on a lot separated from the nearest portion of an existing R or BN use by a grade equal to the height of the sign above the ground, and further finds that continuance of such nonconforming sign will not be materially detrimental to the public welfare or injurious to property in the zone or vicinity in which the sign is located, and is not otherwise inconsistent with the spirit and purpose of the Zoning Ordinance and that such advertising sign has been and will be properly maintained. Decisions of said Superintendent hereunder shall be final, subject to review by the City Council upon application.

(c) Advertising signs in all zones other than the M, IG, and IH Zones which are nonconforming because located upon and supported by a roof or parapet of a building or structure shall be discontinued and removed upon notification in writing within a period of from three to seven years from August 1, 1975 or from the date such sign became or becomes nonconforming in accordance with an amortization schedule established by the Superintendent and based upon the age, condition, cost, and remaining useful life of the sign.

(d) Adult Motion Picture Theaters which are nonconforming in the zone in which located shall be discontinued within 90 days of the date the use became or becomes nonconforming.

5.34 Limitations on Nonconforming Uses

(a) Subject to Section 5.33, any nonconforming building or part may be maintained with ordinary repair provided, however, no such building or part shall be extended, expanded or structurally altered, except as otherwise required by law, nor shall a nonconforming use be extended or expanded, provided further, that nothing in this Ordinance shall prevent the restoration of a nonconforming building destroyed by fire or other act of God.

(b) Any change of a nonconforming use in a conforming building shall be to a conforming use.

(c) Except as provided in Section 5.34 (d) or (e), a nonconforming use in a nonconforming

building or part may be changed only to a use permitted in a less intensive zone than said nonconforming use.

(d) A nonconforming building or part which has been unoccupied continuously for one (1) year or more shall not be reoccupied except by a conforming use.

(e) In any zone, except an M or I Zone, a nonconforming use in a nonconforming building, may be changed to a use permitted in a less intensive zone than the zone in which the nonconforming use would be conforming, or to another use which is listed and grouped in the same zone classification as an outright permitted use, provided such new use will be no more detrimental or injurious than the previous nonconforming use to other property in the same zone or vicinity.

5.35 Existing Automobile Service Stations

Existing automobile service stations may be extended, expanded or structurally altered in the BN and more intensive zones without obtaining conditional use authorization from the *Hearing Examiner* or Board where the estimated cost of such improvements within any 12 month period does not exceed 25 percent of the true and fair market value of such automobile service station as computed from the assessed value of the existing use.

Section 3. That Section 16.2 of the Zoning Ordinance (86300), as last amended by Ordinance 94036, is divided into Sections designated Section 16.20 through 16.23 and further amended to read as follows:

Section 16.20 Principal use permitted outright shall be as set forth in Sections 16.21 through 16.23 of this Article. Reference in other Sections 16.21 through 16.23 of this Ordinance to "Section 16.2" shall mean and include Sections 16.20 through 16.23, inclusive.

Section 16.21 The following uses:

(a) Window displays.
(b) Retail store.
(c) Personal service establishment, such as beauty shop, barber shop and shoe repair shop.
(d) Restaurant, cafe, or establishment selling alcoholic beverages for consumption on the premises with or without live entertainment or dancing; taverns, package liquor stores.
(e) Bank or other financial institution.
(f) Hotel, Motel.
(g) Transportation ticket office, travel agency office.
(h) Private or public art gallery, museum and library.
(i) Locksmith.
(j) Catering establishment selling at retail.
(k) Glazed display case.
(l) Child care nursery.
(m) Public playground and public park, including customary buildings and activities.
(n) Theater *and adult motion picture theater.*
(o) Advertising sign when subject to applicable provisions of this and other Ordinances.
(p) Automobile rental office.

Section 16.22 Uses permitted when occupying other than street level floor space; or, permitted when occupying

street level floor space providing that such use shall be separated from the street by a space occupied or intended to be occupied by uses permitted in Section 16.21, and also separated by a view obscuring wall located across the rear of such permitted uses as specified in Section 16.21:

(a) Business or Professional office.
(b) Catering establishment.
(c) Taxidermy shop.
(d) Wholesale store, including wholesale storage of the following merchandise: jewelry, optical and photographic goods, pharmaceuticals, and cosmetics, and other similar high value, low bulk articles.
(e) Telephone exchange, static transformer and booster station, and other public utility service use.
(f) Meeting hall, auditorium, theater, bowling lane, skating rink, pool hall, dance hall.
(g) Radio and television studio.
(h) Appliance repair.

Section 16.23 Uses permitted when occupying other than street level floor space:

(a) Uses permitted in Sections 16.21 and 16.22 without specified limitations.
(b) Trade or business school.
(c) Custom manufacture for sale at retail on the premises of articles or merchandise from the following previously prepared materials: bone, canvas, cellophane, cloth, cork, feathers, felt, fiber, fur, glass, hair, horn, leather, paper, plastics, precious or semi-precious metals or stones, sheet metal (excluding stampings of metal heavier than fourteen (14) gauge, shell, textiles, tobacco, wax, wire, wood and yarns.

(d) Experimental or testing laboratory which does not employ machinery or equipment prohibited by Section 16.7 (b).
(e) Private or fraternal club, lodge, social or recreational building with dining and other social facilities.
(f) Art, dance, and/or music school or studio.
(g) Printing and publishing establishment.
(h) Manufacture of musical instruments, except pianos and organs; toys, novelties, rubber or metal stamps, or other small moulded rubber products; pottery and figurines or other similar ceramic products from previously pulverized clay, kilns to be fired by electricity or gas.
(i) Manufacture or assembly of electrical appliances, electronic instruments and devices, and radios and phonographs.

Section 4. That Section 17.21 of the Zoning Ordinance, as last amended by Ordinance 104423, is further amended to read as follows:

Section 17.21 The following uses:

(a) Retail store, business and professional office, personal service establishment, bank or other financial institution, catering establishment, restaurant, cafe, or establishment selling alcoholic beverages for consumption on the premises, with or without live entertainment or dancing, window display space, glazed display case, transportation ticket office, travel agency office, and bakery, provided it sells its products at retail on the premises.

(b) Hotel, apartment hotel and motel.
(c) Pool hall, public dance hall, tavern, package liquor store, and other similar enterprises.
(d) Frozen food lockers, retail ice dispensary, not including ice manufacture, plant nursery including retail sales of products.
(e) Taxidermy shop, locksmith, appliance repair shop, upholstery establishment, retail pet shop or small animal clinic for out-patient treatment only, retail building supply store, automobile laundry, printing and publishing establishment, and photographic processing laboratory.
(f) Meeting hall, auditorium, theater, *adult motion picture theater*, bowling lanes, skating rink including outdoor ice-skating rink.
(g) Automobile and pleasure boat display or sales establishment, automobile repair, minor.
(h) Automobile rental and sales, provided that any portion of said area not permanently maintained in a landscaped condition shall be graded, drained and surfaced as required in Section 23.41 (c).
(i) Parking garage and automobile rental garage, commercial parking lot for private passenger vehicles only, open structures for parking of private passenger vehicles only.
(j) Trade or business school, art, dance and/or music school or studio.
(k) Laundry, dry cleaning, dyeing or rug cleaning plants.
(l) Warehouse or wholesale store; wholesale office, including wholesale storage of the following

merchandise: jewelry, optical and photographic goods, pharmaceuticals, and cosmetics and other similar high value, low bulk articles.

(m) Experimental or testing laboratory which does not employ machinery or equipment not permitted in the CM Zone.

(n) Fire station, public and private art gallery, library, museum, branch telephone exchange, micro-wave or line-of-sight transmission station, and other public utility service uses when necessary due to operating requirements but not including yards or buildings for service or storage.

(o) Church, private or fraternal club, lodge, social or recreational building.

(p) Advertising sign, when subject to applicable provisions of this and other Ordinances.

(q) Uses permitted in Section 19.22, provided that such uses shall not occupy any street level floor space.

(r) Public or private park.

(s) Existing railroad rights of way, including passenger shelter stations but not including switching, storage, freight yards or sidings.

(t) Radio and television studio.

Section 5. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 17th day of May, 1976, and signed by me in open session in authentication of its passage this 17th day of May, 1976

/s/ _____
President of the City Council

Approved by me this 28th day of May, 1976

/s/ Wm. Uhlman
Mayor

Filed by me this 28th day of May, 1976

Attest: /s/ E. L. Kidd
City Comptroller and City Clerk

(SEAL)

Published _____ By /s/ H. Anqeuine
Deputy Clerk

ORDINANCE 105581

AN ORDINANCE relating to land use and zoning; amending Section 18.7 of the Zoning Ordinance (86300) to prohibit adult motion picture theaters in the CG and all more intensive zones.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. That Section 18.7 of the Zoning Ordinance (86300) is amended to read as follows:

Section 18.7 Prohibited Uses:

(a) Any use other than a permitted CG use, which is permitted in a more intensive zone.

(b) Adult motion picture theater.

Section 2. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor, otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 1st day of June, 1976, and signed by me in open session in authentication of its passage this 1st day of June, 1976.

/s/ _____
President of the City Council

Approved by me this 7th day of June, 1976

/s/ Wm. Uhlman
Mayor

Filed by me this 7th day of June, 1976

Attest: /s/ E. L. Kidd
City Comptroller and City Clerk

(SEAL)

Published _____ By /s/ H. Anqeuine
Deputy Clerk

STATE OF WASHINGTON)
COUNTY OF KING) SS
CITY OF SEATTLE)

I, E.L. Kidd, Comptroller and City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of the original instrument as the same appears on file, and of record in this department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of The City of Seattle, this 1-4-79.

E.L. KIDD
Comptroller and City Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-1460

APPLE THEATER, INC.,
Petitioner,

v.

CITY OF SEATTLE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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Assistant City Attorney
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TABLE OF CONTENTS

Page

Counterstatement 1

Argument 3

1. No Significant New Federal Questions Are Presented by This Case 3

   A. Appellant's Equal Protection Rights Are Not Violated by Land Use Regulations Applying to All Adult Motion Picture Theaters But Not to Other Adult Entertainment Establishments Because the City May Legitimately Deal With Certain Land Use Problems Without Addressing Them All at One Time 4

   B. A Determination to Confine and Not Disperse is a Legislative and Not a Judicial Decision and Has No Constitutional Significance. 6

2. The Ordinance is Not Vague; However, Even if it Were as to Others, It Is Not as to Appellant Because Appellant Admits it Shows Adult Films Exclusively. 7

Conclusion 9

TABLES OF AUTHORITY

Table of Cases

Barrett v. Indiana, 229 U.S. 26, 57 L. Ed. 1050 (1913). 5

City of New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). . . 6

Page

Euclid v. Ambler Realty, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). 6

Gooding v. Wilson, 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1973). 8

Katzenbach v. Morgan, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966). 6

McLaughlin v. Florida, 379 U.S. 184, 13 L. Ed. 2d 222, 22 S. Ct. 283 (1964) 6

Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974). . . 5-6

Young v. American Mini Theaters, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). . 3,4,5, 6,8,9

Constitutional Provisions

U.S. Const. amend. I 4,8,9

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COUNTERSTATEMENT

Apple Theater seeks to entice this Court to review the judgment of the Supreme Court of the State of Washington upholding the validity of certain City of Seattle zoning ordinances regulating the location of adult motion picture theaters by implying such ordinances have both a broader and more restrictive application than is demonstrated by the ordinances and appendices in its petition.

First, appellant would have this Court believe that confinement of adult motion picture theaters to three zones is "cluster" zoning, presumably to imply a very limited availability of suitable locations or to suggest that the market is somehow burdened. The Court should note that the area where such theaters are permitted uses is neither small nor particularly confined. Instead it is an area of mixed commercial and business uses and encompasses all of downtown Seattle, an area of approximately 250 acres; as the court below noted, adult theaters could easily find a location in the designated zones (App. A to Petition at A-9).

Secondly, appellant would have this Court believe the ordinances require "shuttering" or "termination" of businesses. The ordinances merely require termination of nonconforming theater uses in zones where such uses are not permitted within 90 days of the date the use becomes nonconforming. Appellant may continue to operate a motion picture theater at its existing location. Neither its lease nor its license restrict or confine its operation to adult motion picture fare.

By using such terms, appellant seeks to make this case something it is not. The federal questions presented by zoning laws distinguishing adult motion picture theaters from other theaters and regulating their locations for land use purposes have already been decided by this Court in Young v. American Mini Theaters, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). The instant case is in accord with that decision (and appellant has not argued that it is not) and with other applicable decisions of this Court.

Respondent submits that review should be denied because this case presents no new significant federal questions and because no vagueness exists in the ordinances or as applied to appellant.

ARGUMENT

1. No Significant New Federal Questions Are Presented By This Case

This Court in Young v. American Mini Theaters, supra, determined that a city may legitimately regulate the location of adult motion picture theaters in order to preserve and protect the

present and future character and quality of communities and urban life, and that a zoning regulation could classify and treat adult motion picture theaters differently from other theaters for such purposes without violating equal protection principles or First Amendment rights.

Appellant does not argue that the State Court's decision in the instant case is in conflict with or contrary to the Young decision. Instead, it argues that because the City's ordinances have confined instead of dispersed such uses and because they have not regulated other adult entertainment establishments at the same time (an underinclusive argument, presumably), such ordinances deny it equal protection. Respondent submits that such arguments present no new significant federal questions for the Court's determination.

A. Appellant's Equal Protection Rights Are Not Violated by Land Use Regulations Applying to All Adult Motion Picture Theaters But Not to Other Adult Entertainment Establishments Because the City May Legitimately Deal With Certain Land Use Problems Without Addressing Them All at One Time

The thrust of appellant's argument is that the City's zoning amendments are underinclusive and therefore deny it equal protection because such ordinances do not also regulate the location of other adult entertainment establishments.

Neither did the Detroit ordinance in Young, supra, regulate all adult entertainment establishments, although, admittedly, other amendments regulated more than adult theaters. For instance, Detroit's ordinance did not include massage parlors, "blue motels," burlesque houses, body painting studios, or nude wrestling studios. Nor did it include peep shows and panorams which Apple Theater is suggesting here should have been included. Young, f.n. 3, at 52.

This Court has long held that different classes may be treated differently. Barrett v. Indiana, 229 U.S. 26, 57 L. Ed. 1050 (1913). In a zoning context, this Court has previously held that legislative classifications must be allowed to control and that such classifications do not violate equal protection guarantees unless they are clearly arbitrary and unreasonable. Village of

Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974); Euclid v. Ambler Realty, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). Moreover, this Court has held that governmental regulations to resolve problems confronting the community may be resolved one by one without violating equal protection guarantees; a statute need not cure all evils perceived at the same time. City of New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976); Katzenbach v. Morgan, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); McLaughlin v. Florida, 379 U.S. 184 at 191, 13 L. Ed. 2d 222, 22 S. Ct. 283 (1964).

B. A Determination to Confine and Not Disperse is a Legislative and Not a Judicial Decision and Has No Constitutional Significance

In Young, supra, the court expressly recognized legislative discretion in determining whether to confine or disperse adult theaters, noting that a municipality may legitimately do either, but that, in any event, the City's interest in preserving urban life was sufficiently important for such purposes. Young at 62, 70-73.

2. The Ordinance is Not Vague; However, Even If It Were As to Others, It is Not as to Appellant Because Appellant Admits it Shows Adult Films Exclusively

Appellant argues that Seattle's zoning ordinance is void for vagueness because it has not identified how many films of the type defined would create an adult theater use. It then argues that Detroit's ordinance was not so infirm because it included a quantitative term in the definition of adult book stores.

This case does not involve adult bookstores; it deals with adult motion picture theaters. The definition of such theaters in the Detroit ordinance is similar to the Seattle ordinance in this respect: neither identifies the number of films or materials later defined which must exist before the use exists. Arguably, inserting a quantitative term such as "significant" or "substantial" into the definition, as appellant seems to suggest, would create vagueness, not eliminate it, because such terms are relative and susceptible of multiple interpretations.

The use of the theater for the presentation of the defined films is what is addressed in both zoning ordinances to determine whether an adult motion picture theater use exists. If it does, then such uses are permitted only in certain locations. No uncertainty and vagueness exists in determining that use.

Appellant argues, however, that if the exhibition of a single film of the type defined creates an adult theater use, then the ordinance is constitutionally overbroad. Such an argument confuses the principles of vagueness and overbreadth. Unconstitutional vagueness exists when there is inadequate notice of proscribed conduct; whereas, overbreadth invalidates legislation which, while not vague, is unnecessarily broad because it proscribes or inhibits conduct protected by the First Amendment. Gooding v. Wilson, 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1973); Young, supra.

A zoning regulation restricting adult theater uses to certain locations but which does not censor, restrict, or limit the showing of the films

themselves does not proscribe or inhibit conduct protected by the First Amendment; it remains neutral on the content of the films although it uses such content for the purposes of classification. Young, supra.

In any event, the hypothetical arguments advanced by appellant should not concern this Court because Apple Theater admits it shows films of the type defined in the ordinance exclusively. Whatever uncertainties exist with application of the ordinance to others do not exist with respect to Apple Theater and, because of this, as in Young, appellant has not been denied due process. See Young at 59-62.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GORDON F. CRANDALL
Assistant City Attorney
Attorney for Respondent